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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-824

HAROLD BRAUER,
Petitioner

v.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,
Respondent

MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE MOTION PICTURE INDUSTRY PENSION PLAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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In The

Supreme Court of the United States

October Term, 1978

No. 78-824

Harold Brauer,

Petitioner

v.

Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada,

Respondent

MOTION OF THE MOTION PICTURE INDUSTRY PENSION PLAN TO SUBMIT BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Motion Picture Industry Pension Plan (herein "MPIPP") moves this Court for leave to file the accompanying brief

as *Amicus Curiae* supporting Petitioner Brauer. In support of this motion, the MPIPP shows as follows:

1. The MPIPP is a pension plan governed by the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (herein "ERISA"), and created pursuant to collective bargaining agreements. The MPIPP has been in existence since 1953 and has approximately 31,500 participants, all of whom work in the motion picture industry. The MPIPP's principal place of business is Los Angeles, California.

2. The MPIPP is subject to the provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (herein the "Act").

3. The MPIPP has as participants the employees (including some supervisory employees) of many motion picture studios. Some of these participants have formed, for federal tax purposes, corporations in which each participant works as his own corporation's employee. A participant so incorporated generally owns 100 percent of the stock of his corporation, and generally the participant is the corporation's only employee. The participant's corporation contracts with the motion picture studios to provide the participant's services, and the participant's pension contributions are made through the participant's corporation. If the opinion of the court below is allowed to stand, the status of a substantial number of the MPIPP's participants, those who own 50 percent or more of their own corporations, is completely uncertain because of the conflicting decisions discussed in the brief *Amicus Curiae*. They may or may not be unlawful participants.

4. Persons working in the motion picture industry in jobs covered by collective bargaining agreements are required to contribute to the MPIPP through employer withholding from their compensation, and the employer

is required to make contributions to the MPIPP on behalf of such persons. Moreover, union membership is required by pertinent collective bargaining agreements as a condition of employment. An employee of a motion picture studio working through his wholly-owned corporation is therefore required to contribute to the MPIPP as a condition of employment, even though the decision of the court below would make it unlawful for the MPIPP to accept such contributions. The MPIPP, as a fiduciary with respect to these shareholder-participants, has a serious interest in having this Court settle the question of these participants' status.

5. The issues raised in the court below are of grave concern to pension plans throughout the United States. The MPIPP is typical of pension plans governed by ERISA and subject to Section 302(c)(5) of the Act, and it is a common practice in many industries, notably the construction and motion picture industries, for employees to belong to a union within their industry and to own stock in their corporate employers as well.

6. The decision of the court below is in direct conflict with decisions of other courts which have examined the issue of pension plan participant eligibility under Section 302(c)(5). This conflict presents a serious problem to the MPIPP and other plans. That problem is whether to continue to accept contributions from participants who own 50 percent or more of their corporate employers, or whether to follow the decision of the court below and exclude such participants from further participation. The serious nature of the consequences of this choice is underscored by the fiduciary responsibility imposed by ERISA upon pension plan trustees with respect to the shareholder-participants whose further participation is in question.

7. The MPIPP has requested but has not obtained consent of the Respondent to file the brief *Amicus Curiae* that follows. Therefore, as required by Supreme Court Rule 42, the MPIPP submits this Motion for leave to file the brief *Amicus Curiae.*

WHEREFORE, it is respectfully moved that the MPIPP be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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December 19, 1978

IN THE

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OCTOBER TERM, 1978

No. 78-824

HAROLD BRAUER,
Petitioner

v.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,
Respondent

BRIEF *AMICUS CURIAE* OF THE MOTION PICTURE INDUSTRY PENSION PLAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Motion Picture Industry Pension Plan (herein "MPIPP") respectfully submits this brief *Amicus Curiae* in support of the petition for a writ of certiorari in this case filed by Harold Brauer.

STATEMENT OF THE CASE

The facts as set forth in the briefs of the parties to this case are sufficient for the *Amicus Curiae* to present its position as a friend of the Court. One key point, however, should be stressed. The California Court of Appeal, in the case below,* defined "employee" by examining only National Labor Relations Board bargaining unit cases and the Board's interpretation therein of "employee" under 29 U.S.C. § 152(3) (herein "Section 2(3)") of the National Labor Relations Act (herein the "Act"). The California court failed to consider decisions of both this Court and the United States Courts of Appeals that have held that the 29 U.S.C. § 186(c)(5) (herein "Section 302(c)(5)") definition of "employee" for pension plan purposes is *broader* than the Section 2(3) definition of "employee" for bargaining unit purposes.

REASONS FOR GRANTING THIS WRIT

I. THE DECISION OF THE COURT BELOW, WHICH INTERPRETS THE DEFINITION OF "EMPLOYEE" AS USED IN SECTION 302(c)(5) OF THE NATIONAL LABOR RELATIONS ACT SO AS TO EXCLUDE PERSONS OWNING 50 PERCENT OR MORE OF THEIR CORPORATE EMPLOYERS' STOCK, RAISES A SUBSTANTIAL FEDERAL QUESTION, CREATES A DIRECT CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS CONSTRUING SECTION 302(c)(5) AND DIRECTLY CONFLICTS WITH THE INTERNAL REVENUE CODE.

A. The Decision Below Raises a Substantial Federal Question.

This Court has jurisdiction to decide the instant case under 28 U.S.C. § 1257(3) which provides for a writ of certiorari where "any title, right, privilege or immunity is specially set up or claimed under the . . . statutes of . . . the United States."

The court below decided a federal question, the interpretation of "employee" in Section 302(c)(5) of the Act, as the basis for its holding for Respondent herein. The court stated,

> "In our view, the matter turns upon the questions whether one is an employee so as to satisfy the Act's requirements and *whether that determination is solely ascertained by reference to federal rather than state law. The latter question is answered clearly in the affirmative.*" 82 Cal. App. 3d at 163 (emphasis supplied).

There can be no question as to the proper presentation of a federal claim when the highest state court to consider the federal claim expressly passes on it as occurred herein. *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 299 (1971); *Raley v. Ohio,* 360 U.S. 423, 436 (1959).

B. The Decision Below Ignores the Guidance of This Court and Conflicts with Other Decisions Construing Section 302(c)(5).

Another valid reason for the granting of certiorari by this Court is the presence of a direct conflict between the decision of the highest court of a state and that of a federal court of appeals. R. Stern & E. Gressman, Supreme Court Practice § 4.9 (4th ed. 1969).

In deciding that the definitions of "employee" derived from bargaining unit cases had to be the definitions to be used in interpreting Section 302(c)(5), the court below ignored the teaching of this Court that the definition of "employee" as that term is used in Section 302(c)(5) is broader and more inclusive than the definition of "employee" to be used in a bargaining unit context. In *Allied*

* Brauer v. Sheet Metal Workers Pension Plan, 82 Cal. App. 3d 159, *appeal denied,* .... Cal. 3d .... (Aug. 24, 1978).

Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 170 (1971), this Court stated that "there is no anomaly in the conclusion that retired workers are 'employees' within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but are not 'employees' whose ongoing benefits are embraced by the bargaining obligations of § 8(a)(5)."*

More specifically, the decision of the court below conflicts with the recent decision of the United States Court of Appeals for the Seventh Circuit in *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978), holding that supervisors, even though they are specifically excluded from the Section 2(3) definition of "employees" for bargaining unit purposes, are nevertheless "employees" for Section 302(c)(5) purposes. *Reiherzer*, it is submitted, makes it clear that the California Court of Appeal's assumption that "employee" is defined uniformly throughout the Act was indeed erroneous.

The present uncertainty faced by pension plans such as the MPIPP is further exacerbated by directly conflicting decisions in other jurisdictions. For example, in *Sanchez v. Trustees of Pension Plan*, 359 So. 2d 1279 (La. 1978), the Louisiana Supreme Court recently held that a 50 percent corporate shareholder was an employee of his closely-held corporation for Section 302(c)(5) purposes.

* The National Labor Relations Board's rationale for excluding 50 percent shareholders from voting in representation elections is grounded on considerations such as maintaining a community of interest among employee voters; avoiding the inhibition of other voting employees from enjoying "the fullest freedom in exercising the rights guaranteed" under Section 9(b) of the Act that might otherwise be present; and avoiding the obvious conflict which would occur by permitting a person to vote and be represented by a union when that same person may also possess the authority to determine an employer's labor policy. None of these considerations attach to an interpretation of "employee" under Section 302(c)(5).

C. The Decision Below is in Direct Conflict with the Definition of "Employee" Used by the Internal Revenue Service in Regulating Pension Plans.

Pension plans such as the MPIPP must qualify under the Internal Revenue Code, 26 U.S.C. § 1, *et seq.* (herein the "Code") in order to be tax-exempt. Section 501 of the Code requires that a pension plan comply with the provisions of Section 401(a) of the Code. Section 401(a)(2) provides that a tax-exempt trust fund must be "for the exclusive benefit of [an employer's] employees or their beneficiaries." The Section 401(a)(2)* language was in effect in 1947 when Congress added Section 302(c)(5) to the National Labor Relations Act, providing that payments out of Section 302(c)(5) pension funds be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." The fact that the language of Section 401(a)(2) of the Code is nearly identical to the language of Section 302(c)(5) of the National Labor Relations Act is a strong indication that Congress intended the later-passed Section 302(c)(5) to limit the class of qualified pension plan beneficiaries in the same manner as the class was limited by the qualification provisions of the Internal Revenue Code.

Section 401(a)(2) has been consistently interpreted as allowing shareholders, even sole shareholders, to be qualified pension plan participants so long as the pension plan does not discriminate in favor of shareholder-participants. *See* 26 U.S.C. § 410(b)(1)(B); Treasury Regulation § 1.401-1(b)(3). Thus, to interpret the language of Section 302(c)(5) as precluding participation in a Section 302(c)(5) pension trust by employees owning more than 50 percent of their corporate employers, as did the court below,

* In 1947 the language that is today codified as 26 U.S.C. § 401(a)(2) was codified as 26 U.S.C. § 165(a).

creates yet another conflict in the law relating to pension plans.

II. UNTIL THE DEFINITION OF "EMPLOYEE" IN SECTION 302(c)(5) IS RESOLVED BY THIS COURT, FIDUCIARIES OF PENSION PLANS GOVERNED BY ERISA ARE FACED WITH A DILEMMA WHICH PRESENTS SERIOUS CONSEQUENCES BOTH TO PLAN PARTICIPANTS AND TO THEMSELVES.

Under the Employee Retirement Income Security Act of 1974 (herein "ERISA"), pension plan trustees are charged with fiduciary responsibilities to all plan participants, including shareholder-participants.* The fiduciaries' dilemma is that they must either permit participating shareholders to continue to participate and thus accept contributions which may be illegal, or they must exclude shareholder-participants from participation and deny pension benefits which were intended to be protected by ERISA. If the first course of action is followed, the plan fiduciaries may incur personal liability for improper payment of plan assets to shareholder-participants in the form of pension benefits. ERISA § 409. If the second course of action is followed, the plan fiduciaries will, at the very least, face a flood of litigation from shareholder-participants who, in good faith for many years and in conformity with industry practice, have rendered personal services through their wholly-owned corporations. Moreover, the remedy suggested by the Court below, the restoration of contributions, is prohibited by ERISA for contributions made after ERISA's effective date, January 1, 1975, except for those contributions made under mistake of fact within the preceding year. (ERISA § 403(c)(2)(A)).

* ERISA specifically recognizes that shareholders are proper plan participants. 26 U.S.C. § 410(b)(1)(B).

CONCLUSION

For the reasons stated above, and those stated by Petitioner Brauer, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

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December 19, 1978

Service of the within and receipt of a copy thereof is hereby acknowledged this ..... day of December, A. D. 1978.

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